

The battle for the compliance with the rule of law in the European Union is not over yet

“The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”.¹

The rule of law is embedded in Article 2 of the Treaty on the European Union (TEU) as one of the most important values of the EU. Under this principle, all public powers need to act within the constraints set out by law, with respect for democratic and fundamental rights under independent and impartial courts.² The essentiality of its protection lies in the fact that the rule of law has a direct impact on the life of every citizen.³ Since its onset, the Covid-19 pandemic has exacerbated the already critical situation regarding the adherence to the rule of law in Europe. In the previous year, all member states had to take exceptional measures in order to protect public health, such as declaring public emergency, or granting special emergency powers to the governments, which can be easily misused.⁴ For example, in March 2020, the Hungarian Fidesz party approved a bill, that granted the government emergency powers amid the pandemic situation. This act enabled Prime Minister Orbán to rule by decree⁵, which caused a wave of criticism from the opposition parties and members of the European Parliament.⁶ The emergency law enabled more than 100 decrees to be issued, some of which have no proven connection to the pandemic, such as the potential prison sentences for the spreading of false information.⁷ The Hungarian government was pressured by Brussels to revoke the emergency law in June 2020, however the breach of the rule of law did not subside. Moreover, the latter was followed by an immediate presentation of another bill, giving the government the power to order any measures without parliamentary approval,⁸ allowing it to issue another state of emergency.⁹

Since March 2020, the Commission has been monitoring such measures in the member states, many of which, such as those in Hungary, have proven to have a negative impact on the rule of law. When threats to the rule of law occur, they challenge the legal, political and economic basis of the EU. Any deficiency in one-member state starts a chain reaction and impacts the other members as well as the entire Union. For this reason, the EU has to take an active role in resolving rule of law issues, wherever they occur. The adherence to this principle is pivotal for the functioning of the internal market and the judicial area and is essential to the financial interests of the Union.¹⁰ The rule of law is the *sine qua non* of every successful European society.¹¹ Therefore, strengthening it within the EU ought to remain one of the primary aims in the upcoming years.¹²

The rule of law is protected by numerous different mechanisms, ranging from political to legal, and from ‘softer’ to ‘harder’ mechanisms.¹³ The EU has taken efforts to step up the legal tools at its disposal, for instance the Commission has established a so-called Rule of Law Review Cycle. This process was set up in order to stop countries such as Hungary, Poland, and Romania from breaching EU norms. It involves EU officials requesting information from national institutions, NGOs and EU agencies, being summarized in a final product – an annual rule of law report. The first annual report of this kind was published in 2020. The report outlined the backsliding situation in the relevant countries¹⁴ and identified possible problems in areas such as justice systems, the anti-corruption framework, media pluralism and freedom.¹⁵ Furthermore, the Rule of Law Report is a preventive tool and part of the new annual European Rule of Law Mechanism.¹⁶ Other prevention and promotion tools of the EU include the European Semester, an annual process,

which results in recommendations tailored to a specific country aiming at justice systems and anti-corruption measures in order to boost economic growth.¹⁷ When it comes to response instruments, the EU’s rule of law toolbox contains the Rule of Law Framework and the procedure according to Article 7 TEU.¹⁸ The Rule of Law Framework is a warning tool launched by the Commission in 2014, giving it the possibility to enter into dialogue with a member state in order to tackle threats to the rule of law.¹⁹ The procedure under Article 7 TEU is activated, when a clear risk of a serious breach occurs, or when a serious and persistent breach of Article 2 TEU already happened.²⁰ The procedure can lead to the suspension of the offending member state’s voting rights in the Council. However, the possibility of an actual sanction is difficult to achieve, as this requires unanimity in voting.²¹ For the first time, the infringement procedure under article 7 was initiated by the European Commission against Poland on the 20th of December 2017 and by the European Parliament against Hungary on the 12th of September 2018.²² The reasons for starting the procedure against Poland were judicial reforms, which have put the country’s justice system under the political control of the ruling majority with the absence of judicial independence.²³ Numerous breaches of the rule of law in Poland occurred, by passing the Law on the Supreme Court, which lowered the retirement age of Supreme Court judges from 70 to 65, putting 27 out of 72 Supreme Court judges at risk of being forced to retire.²⁴ In March 2019, the Commission opened an infringement procedure against Poland due to the new disciplinary system for judges, which granted substantial powers to the minister of justice and institutions under the control of the government.²⁵ With regards to Hungary, a report by MEP Judith Sargentini, triggered the first Article 7 vote due to the breach of judicial indepen-

dence, freedom of expression, rights of minorities and the measures taken in regard to migrants and refugees.²⁶ Hungary conducted several actions that violate the EU principles, such as the opposing of the mandatory relocation scheme, the unlawful detention and the deprivation of food of over 30 detainees in the transit zones, the controversial “slave law” and the “Stop Soros” law, etc.²⁷

A further step to ensure compliance with the rule of law within the EU was taken in July 2020, when the European Council highlighted the importance of the protection of the Union’s financial matters and the need to respect the rule of law.²⁸ This resulted in the launch of a budget conditionality regime, in order to protect the recent EU budget. This proposal links the rule of law to the use of EU funds and would allow the EU to restrict access to these funds in case of breaches. The latter is different from all the other above-mentioned tools. It is a financial instrument that ought to protect the EU budget from risk, due to deficiencies of the rule of law in a member state.²⁹ This is however not a new concept, the idea of conditionality was already launched in 2018, when the Commission presented a proposal for a regulation that introduced a general rule of law conditionality, meaning, that any Member State that happens to have a rule of law deficiency can be subject to the suspension of payments or reduced funding. This conditionality has become an important element of the negotiations regarding the legislative package for the 2021-2027 Multiannual Financial Framework (MFF) and the Recovery Instrument for the aftermath of the Covid-19 (Next Generation EU).³⁰ Based on the latter, a deal on the rule of law conditionality mechanism was reached on the 5th of November 2020, during the MFF negotiations, applicable not only to cases of corruption or fraud, but also to breaches of fundamental EU values such as freedom and democracy. This preliminary success was short lived however, as countries such as Hungary and Poland vetoed the whole package thus deadlocking the entire budget.³¹ The result being, that the necessary unanimity in favour of the mechanism, needed in order to

move ahead with the budget and recovery plan could not be reached.³² Poland and Hungary decided to block the 1.8 trillion euro (\$2.18 trillion) 2021-2027 EU budget and coronavirus recovery fund drawn up for the 27 member states, as their governments disagreed with the clause tying the funds to the rule-of-law principle.³³ Hungary was vocal about hindering the EU funds being linked to political or ideological conditions. According to the European Commission, Hungary would receive at least a net of 4 billion euros under the recovery fund. When it comes to Poland, this sum would be around 65 billion euros.³⁴

On the 10th of December 2020, the European Council discussed the objections highlighted by Hungary and Poland against the rule of law mechanism. The two member states expressed the opinion that the establishment of such a mechanism is contrary to the treaties.³⁵ After long negotiations, the European Council came to a compromise agreement. According to this, the Commission should not finalize its guidelines under the Regulation until after the European Court of Justice rules on this matter.³⁶ The European Commission will till then refrain from implementing the legally binding rule of law mechanism. This is a process of ruling on its legality and can take months or even years.³⁷ The rule of law mechanism can only be applied in cases of fraud, corruption, and conflicts of interest involving the use of EU money. To sanction a country, the procedure must prove that the EU’s financial interests were harmed or affected in a direct way. The fact that the mechanism was limited to serve the protection of the EU financial interests, excludes the mechanism being applied for rule of law breaches in general, as foreseen previously.³⁸ Also, a complex consultation process with the member states has to make clear, how the mechanism will be used. The compromise provides for an emergency brake regarding the entire process, in particular, it provides “assurances” on how the mechanism can be implemented. Objective grounds and the equality of member states has to be respected and the member state has the right to appeal to the European Court of Justice in case of being found guilty.³⁹ The European Council

noted the Commission’s intention to adopt “guidelines” to determine the manner in which it will apply the mechanism. Regarding the preparation of such guidelines, the European Council took into account elements such as the subsidiary character of the mechanism and the principle of proportionality.⁴⁰

Prime minister Orbán was very keen to narrow down the scope of the conditionality, because, as mentioned previously, the litigation will most likely take years, meaning that Orbán’s government would still be able to use EU funds until the 2022 parliamentary elections.⁴¹ Hungary was therefore relieved that the mechanism will not be introduced ahead of the elections in 2022.⁴² The country made sure that the budget conditionality would not involve matters such as migration or gender issues.⁴³ Moreover, it is more than expected, that Orbán’s government will maintain its course of actions in the new budget cycle as well.⁴⁴ The leader of Hungary is a right-wing nationalist who has been accumulating unprecedented power for over a decade now. The country has clashed with Brussels for years due to the backsliding of democracy.⁴⁵ Orbán has been steadily eroding the freedom of media, the educational system and limiting the power of the judiciary.⁴⁶ His government has also persecuted opposition media and has shut down the foreign owned Central European university.⁴⁷ Hungary is openly favouring the concept of “illiberal democracy”, and therefore it is the first EU country to be considered just partly-free by the think tank, ‘Freedom House’.⁴⁸

Poland is also ruled by a right-wing populist government and similarly to Hungary, has prompted bloc-wide concerns regarding its violations of European principles.⁴⁹ Orłén’s recent acquisition⁵⁰ of Polish regional press and the ruling PiS party further tightening its grip on the Polish press shows that it is right about time for urgent action.⁵¹

Unfortunately, democratic backsliding often thrives on the behavior of citizenry, when citizens become passive observers of their leaders, a phenomenon known as

“audience democracy”, it can have a negative impact on democracy itself. This is the result of a lack of political participation by the citizens, such as a party membership, engagement in politics and electoral voting. This can also be seen from the example of Poland, which has one of the lowest numbers of party membership in the EU (only approx. 1 percent of the adult population). To minimize this phenomenon, the need for an engagement of citizens in political affairs should be increasingly brought into light.⁵²

Conclusion

Breaches of the rule of law and the backsliding of democracy are still regularly occurring events in Europe and therefore the EU has to stand strong in the battle for its principles. Legal action against these aspects is currently not highly effective when it comes to the practice. The EU needs to refine its instruments for the protection of European values.⁵³ The EU’s toolbox that supports the respect for the rule of law has many imperfections.⁵⁴ For instance, the procedure under article 7 is slow and leads to sanctions only if the offender has no allies in the European Council.⁵⁵ The newly adopted mechanism has also proven to be weak, as it is not able to sanction violations of the rule of law in general.⁵⁶ The EU’s monitoring mechanisms lack to provide a full picture of the state of democracy within the Union.⁵⁷ Also, the EU has not given sufficient support to civil society organizations, which could help increase public awareness of the rule of law. One of the problems also lies in the fact that populist governments often undermine EU values without breaching EU law as such. A good example for this is the Polish government, which has misused its flexibility to limit the independence of the country’s Supreme Court but broke no specific EU directive by doing so.⁵⁸

Right-wing populist parties, such as PiS and Fidesz are competing on moral grounds centered around identity and exploiting their authoritarian tendencies and fueling ‘Eurosceptic’ attitudes within the EU. Hybrid governance forms enjoy great popularity, whereas in these forms

the authority remains seemingly loyal to democratic practices, but they do so through illiberal mechanisms. The rise of illiberalism therefore poses a threat to the normative power of the EU and its political leverage. In order to protect the bloc, the EU member states have to have a clear political narrative, binding them together and they need to shield this narrative to prevent a chain reaction in the spread of undermining tendencies to other member states, by using all the means at their disposal.⁵⁹ Illiberal tendencies are becoming a problem in those countries, where populist leaders have no need to share power in the government. When it comes to this aspect, the developments regarding democracies tend to be less favorable in central and eastern Europe, where electoral systems greatly lean towards the largest party (Hungary), providing for the gain of stronger and undivided power. Whereas in Western Europe, proportional electoral systems guard against undivided power.⁶⁰ Last but not least, even though the number of populists in power is rising across Europe and there are some “red flags” already apparent in some member states that cause reason for concern, the long-term trends point to the expansion of democracy within the EU, as the citizens’ support for democracy is still prevailing in Europe. To keep it that way also in the future, the EU should not relent its vigilance.⁶¹

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